

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY RUSHLOW,

Defendant-Appellant.

UNPUBLISHED

October 30, 2003

No. 241073

Wayne Circuit Court

LC No. 00-011021-01

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of second-degree child abuse, MCL 750.136b(3). He was sentenced to thirty months' to four years' imprisonment. He appeals as of right. We affirm defendant's conviction, but remand for resentencing.

I

This case arises from severe physical injuries suffered by Marissa Heim, who was born on August 4, 1998. The child's mother testified that, at 7:00 p.m. on April 20, 2000, she left the child in defendant's care while she went to work, adding that defendant, along with his wife, had routinely babysat the child for about four months. Upon checking her answering machine the next morning, the mother found several messages stating that the child had been in an accident, and directing her to a hospital. At the hospital, defendant informed her that the child had accidentally fallen and struck her head.

Defendant's wife testified that defendant called her at work and explained that the child had fallen, then later elaborated that the child had fallen backward from a landing and had hit the ground with a very loud "thump."

The child arrived at the hospital unconscious and experiencing some seizure activity. Further examination revealed a life-threatening condition, including a small subdural hemorrhage and serious swelling of one side of the brain. The examining doctor found no significant bumps or bruises on Marissa's head, although there were other indications that evidence of an impact injury was later observed. Treatment included insertion of a trachea tube, and removal of part of the brain to relieve the swelling. Plaintiff's expert, who was the doctor who treated Marissa, opined that Marissa's symptoms were not consistent with a fall of several

inches, but, rather, were indicative of shaken-baby syndrome. The expert described the latter as follows:

[S]haken baby syndrome is a clearly definable form of injury that occurs as a baby is shaken and the head is rotated back and forth. . . . [T]his . . . causes rotational injury. So, as the skull and the brain inside get shaken, the brain has a different speed or velocity that's close to the skull that is shearing off various delicate blood vessels that are called bridging veins. And those bridging veins . . . get ruptured Such vessels, also, can get ruptured behind the eye in the retina, and there are retinal hemorrhages. Also, the brain itself gets torn apart, just like ketchup in a ketchup bottle when you shake, the inside will get sort of scrambled. The same thing happens to the brain. So, it is what is called axonal defuse, axonal injury. Which means that the connections of the brain, some of these nervous fibers just get torn apart. It, also, causes swelling of the brain. The swelling is much more than the subdural hemorrhage that occurs.

Defendant, testifying in his own behalf, described a two-step landing, "you step from the screen porch onto the landing, step from the landing into the kitchen area," and maintained that he had placed the child on that landing, turned to take her hand, and found her already falling. Defendant continued, "I just heard this God awful thud and I just knew within myself that it was her head that hit." Defendant also presented the testimony of two experts. Both opined that Marissa's injuries were consistent with a fall, and were not the result of her having been shaken by defendant.

Defendant was charged with first-degree child abuse. The trial court, sitting as the trier of fact, concluded that the prosecution had failed to prove beyond a reasonable doubt that defendant had a specific intent to injure Marissa. After concluding that defendant had acted recklessly, the court found defendant guilty of the lesser offense of second-degree child abuse. This appeal followed.

II

Defendant points to several excerpts from the prosecutor's closing argument and argues that the prosecutor engaged in misconduct denying him a fair trial. However, defendant failed to object at trial. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (unpreserved issues are reviewed for plain error affecting substantial rights).

In the main, the prosecutor's statements consisted of fair comments on the evidence and credibility of the witnesses. To the extent it can be argued that the prosecutor crossed the line, any prejudicial effect could have been cured by a timely objection and curative instruction. We are also satisfied that the prosecutor's comments did not cause the court to decide the case based on impermissible considerations.

III

Defendant challenges the sufficiency of the evidence to support his conviction of second-degree child abuse. When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Defendant also asserts that the court's verdict was against the great weight of the evidence.

Defendant asserts that the injuries resulted from an accident. However, defendant's argument consists largely of a recital of the experts' testimony. Where there is testimony supporting both sides, it is for the trier of fact to determine which expert is more credible and which testimony more closely coincides with all the evidence presented. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Here, the trial court was free to accept the prosecution's witness' testimony as more credible, and that testimony was sufficient to support the court's determination that defendant was guilty of second-degree child abuse.

Defendant alternatively argues that the verdict is against the great weight of the evidence. Great-weight challenges normally begin with a motion before the trial court to overturn a jury's verdict. See, e.g., *Lemmon, supra* at 627. Such challenges following from bench trials instead invite review of the trial court's factual findings for clear error. MCR 2.613(C); see also *Phardel v State*, 120 Mich App 806, 811-812; 328 NW2d 108 (1982). A trial court's findings are deemed clearly erroneous if, after a review of the entire record, we are left with the firm and definite conviction that a mistake was made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Because the trial court did not clearly err in crediting the expert testimony identifying shaken-baby syndrome in this case, and in discrediting expert and other testimony to the contrary, we cannot conclude that the trial court's verdict is against the great weight of the evidence.

IV

The recommended range for defendant's minimum sentence under the legislative sentencing guidelines was zero to nine months' incarceration. However, the trial court imposed a sentence of thirty to forty-eight months, which is near the statutory maximum. MCL 750.136b(4).¹ Defendant argues that the court improperly considered defendant's refusal to admit guilt in departing upward from the guidelines range. We agree.

¹ The statute authorizes a maximum sentence for second-degree child abuse of four years' imprisonment. Because this offense falls under the rule that the minimum sentence cannot exceed two-thirds of the maximum sentence, MCL 769.34(2)(b); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), the minimum sentence imposed in this case, thirty months' imprisonment, comes very close to the thirty-two months' imprisonment that would constitute the harshest allowable minimum sentence for this crime.

This Court reviews a sentencing court's factual findings for clear error. MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for de novo review. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate only for substantial and compelling reasons. MCL 769.34(3); *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

A defendant's remorse, or lack thereof, is not generally objective and verifiable. *People v Daniel*, 462 Mich 1, 8 and n 9; 609 NW2d 557 (2000). Accordingly, absent objective manifestations that can be ascertained on appeal, a defendant's expressions of remorse do not provide a basis for departing from the recommended range under the sentencing guidelines. See *Fields*, *supra* at 69. Further, a court "cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977).

At sentencing, the trial court elicited from defendant that he was "extremely sorry" that the child was hurt while in his care. Defendant did not, however, take responsibility for causing the injury, i.e., he did not admit that the injuries occurred from his having shaken Marrisa, rather than from her having fallen. The court then commented on the severity of the injuries that the child suffered, and announced that it was "troubled . . . that [defendant] still, to this day, continues to maintain that he has done nothing to harm [the child]. The court added, "[defendant] still, and he has the right to do this, maintains his innocence. But having said that, one of the things the Court . . . can do in taking into consideration the sentence is whether or not you acknowledge responsibility." The trial court's subsequent written explanation for the upward departure similarly details the severity of the victim's injuries,² then continues as follows: "Defendant fails to admit responsibility despite overwhelming evidence against his version of how [the child] sustain[ed] the injuries to her head; evidence presented [at] trial indicated that victim's injuries were caused by being shaken."

Plaintiff characterizes the trial court's actions as having taken into account not defendant's refusal to admit guilt, but simply his lack of remorse. We cannot agree. Defendant's statements at sentencing, taken at face value, indicate great remorse, in general terms.³ The trial court's written statement, in explaining its upward departure, that "defendant fails to admit responsibility despite overwhelming evidence," unmistakably indicates that the court was relying, in part, on defendant's continued protestations of innocence as a reason to

² Defendant does not challenge the propriety of basing an upward departure on this consideration.

³ These statements included the following: "I cannot express the words how sorry I am, what happened. I can't take back what happened on that day. And if I could, I would. But I can't. I can only express that for the last year and half, I have prayed every day, not for myself but for April and for Marissa I can't even fathom the pain and suffering that both our families have gone through I had cried, tears and tears in the passageways of this courthouse. I apologize if you think that I didn't care"

impose a minimum sentence above the guidelines. It is plain, then, that defendant's purported lack of remorse in this instance is wholly a function of his refusal to admit guilt. See *People v Wesley*, 428 Mich 708, 720; 411 NW2d 159 (1987) (Brickley, J., joined by Levin, J., concurring). Because a court may not take protestations of innocence into account, and because remorse, as expressed or not expressed in this instance, is not an objective and verifiable factor, we vacate defendant's sentence and remand for resentencing. *Babcock, supra*.

In light of our disposition of this issue, we need not reach defendant's general proportionality challenge to the sentence he received, except to note that the statutory sentencing guidelines control.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper